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No. 95-8736

In the Supreme Court of the United States

OCTOBER TERM, 1996

LARRY OSA OGBOMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 18 U.S.C. 3583(d) authorizes a district court to order a criminal defendant deported, as a condition of supervised release, without recourse to the standards and procedures for determining deportability and relief from deportation under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, and implementing regulations.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutory provisions involved	1
Statement	2
Summary of argument	11
Argument:	
Section 3583(d) of Title 18 does not authorize a district court to order the deportation of an alien defendant as a condition of supervised release	13
A. The text, purpose, and history of Section 3583(d) establish that a district court may provide for deportation of an alien defendant by the Attorney General if the alien is subject to deportation under the Immigration and Nationality Act, notwithstanding other terms of supervised release, but the district court is not authorized to order the deportation of an alien	14
B. The determination whether an alien defendant is subject to deportation for purposes of Section 3583(d) must be made under the Immigration and Nationality Act	23
Conclusion	39
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Chatima v. *United States*, cert denied, 115 S. Ct. 352 (1994)	5
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	26
Delgado-Chavez v. *INS*, 765 F.2d 868 (9th Cir. 1985)	33
Giambanco v. *INS*, 531 F.2d 141 (3d Cir. 1976)	33

Cases—Continued: Page

Gonzalez, In re, 16 I. & N. Dec. 134 (BIA 1977) 33
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 28
Hassan v. *INS*, 66 F.3d 266 (10th Cir. 1995) 33
Heckler v. *Chaney*, 470 U.S. 821 (1985) 29
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 26
INS v. *Jong Ha Wang*, 450 U.S. 139 (1981) 26
INS v. *Rios-Pineda*, 471 U.S. 444 (1985) 26
INS v. *Yueh-Shaio Yang*, No. 95-938 (Nov. 13, 1996) 26, 27
Jay v. *Boyd*, 351 U.S. 345 (1956) 27
Jew Ten v. *INS*, 307 F.2d 832 (9th Cir. 1962), cert. denied, 371 U.S. 968 (1963) 32
Morrison v. *Olson*, 487 U.S. 654 (1988) 29
Oviawe v. *INS*, 853 F.2d 1428 (7th Cir. 1988) 33
Secchi v. *U.S. Bureau of Immigration*, 58 F. Supp. 569 (M.D. Pa. 1945) 21-22
Shaughnessy v. *Mezei*, 345 U.S. 206 (1953) 31
United States v. *Chukwura*, 5 F.3d 1420 (11th Cir. 1993), cert. denied, 115 U.S. 102 (1994) 4
United States v. *George*, 534 F. Supp. 570 (S.D.N.Y. 1982) 32
United States v. *Kassar*, 47 F.3d 562 (2d Cir. 1995) 13, 31
United States v. *Oboh*:
65 F.3d 900, vacated, 70 F.3d 87 (1995), on reh'g en banc, 92 F.3d 1082 (11th Cir. 1996), petitions for cert. pending, Nos. 96-6653 & 96-6658 8
70 F.3d 87 (1995), on reh'g en banc, 92 F.3d 1082 (11th Cir. 1996), petitions for cert. pending, Nos. 96-6653 & 96-6658 8
92 F.3d 1082 (11th Cir. 1996), petitions for cert. pending, Nos. 96-6653 & 96-6658 ..... 8, 9, 10, 11, 17, 18, 20, 22-23, 30, 31
United States v. *Ogbomon*, No. CR96-PT-124-NE (N.D. Ala. Aug. 29, 1996) 7

Cases—Continued: Page

United States v. *Phommachanh*, 91 F.3d 1383 (10th Cir. 1996) 13, 17, 24, 30, 31, 34, 37
United States v. *Quaye*, 57 F.3d 447 (5th Cir. 1995) ..... *passim*
United States v. *Quintana*, 914 F.2d 1409 (10th Cir. 1990) 32
United States v. *Ramirez*, 948 F.2d 66 (1st Cir. 1991) 13
United States v. *Sanchez*, 923 F.2d 236 (1st Cir. 1991) 5, 8, 13, 24, 30
United States v. *Xiang*, 77 F.3d 771 (4th Cir. 1996) 8, 11, 13, 17, 30, 37
United States ex rel. Knauff v. *Shaughnessy*, 358 U.S. 537 (1950) 28

Statutes and regulations:

Act of Mar. 2, 1931, ch. 371, 46 Stat. 1469 21
Act of June 25, 1948, ch. 645, § 1, 62 Stat. 854 22
Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657 31
Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7347, 102 Stat. 4471 34
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214:
§§ 431-443, 110 Stat. 1273-1281 2
§ 438(a), 110 Stat. 1275 20
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. ____ (*reproduced at* 138 Cong. Rec. H11,787-H11,833 (daily ed. Sept. 28, 1996)) 2
§ 305(a)(3) 20
§ 306 20
§ 306(a) 31
§ 306(c)(1) 31
§ 309 3
§ 309(a) 31
§ 374(a) 34

Statutes and regulations—Continued: Page

§ 374(a)(3) 37
§ 374(b)(3) 38
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2, 5, 11, 13
§ 103(a), 8 U.S.C. 1103(a) 25
§ 158, 8 U.S.C. 1158 27
§ 212(c), 8 U.S.C. 1182(c) 27
§ 212(d)(5), 8 U.S.C. 1182(d)(5) 28
§ 238 (to be codified at 8 U.S.C. 1228) 37, 38
§ 238(c) (to be codified 8 U.S.C. 1228(c)) 33, 34
§ 238(c)(5) (to be codified at 8 U.S.C. 1228(c)(5)) 36
§§ 241-244, 8 U.S.C. 1251-1254 24
§ 241, 8 U.S.C. 1251 26
§ 241(a), 8 U.S.C. 1251(a) 32
§ 241(a)(1)(E)(iii), 8 U.S.C. 1251(a)(1)(E)(iii) 27
§ 241(a)(1)(H), 8 U.S.C. 1251(a)(1)(H) 27
§ 241(a)(2), 8 U.S.C. 1251(a)(2) 26
§ 241(a)(2)(A), 8 U.S.C. 1251(a)(2)(A) 34
§ 241(a)(4), 8 U.S.C. 1251(a)(4) (1952) 32
§ 241(a)(4) (to be codified at 8 U.S.C. 1251(a)(4)) 20
§ 241(b), 8 U.S.C. 1251(b) (1952) 32, 33
§ 241(b)(2), 8 U.S.C. 1251(b)(2) (1988) 8
§ 241(c), 8 U.S.C. 1251(c) 27
§ 242, 8 U.S.C. 1252 ..... 20, 25
§ 242(b), 8 U.S.C. 1252(b) 25
§ 242(b)(1)-(4), 8 U.S.C. 1252(b)(1)-(4) 25
§ 242(c), 8 U.S.C. 1252(c) 28
§ 242(h), 8 U.S.C. 1252(h) 19, 20
§ 242(h)(2), 8 U.S.C. 1252(h)(2) 20
§ 242A, 8 U.S.C. 1252a (1988) 34
§ 242A, 8 U.S.C. 1252a 33, 34, 37
§ 242A(a)(1), 8 U.S.C. 1252a(a)(1) (1988) 34
§ 242A(d), 8 U.S.C. 1252a(d) 9, 11, 24, 25, 33, 36, 37
§ 242A(d)(1), 8 U.S.C. 1252a(d)(1) 33-34, 35
§ 242A(d)(2)(A), 8 U.S.C. 1252a(d)(2)(A) 35
§ 242A(d)(2)(B), 8 U.S.C. 1252a(d)(2)(B) 35
§ 242A(d)(2)(C), 8 U.S.C. 1252a(d)(2)(C) 35

Statutes and regulations—Continued: Page

§ 242A(d)(2)(D)(i), 8 U.S.C. 1252a(d)(2)(D)(i) 35
§ 242A(d)(2)(D)(ii), 8 U.S.C. 1252a(d)(2)(D)(ii) .. 36
§ 242A(d)(2)(D)(iv), 8 U.S.C. 1252a(d)(2)(D)(iv) 36
§ 242A(d)(3)(A), 8 U.S.C. 1252a(d)(3)(A) 36
§ 242A(d)(4), 8 U.S.C. 1252a(d)(4) 36
§ 242B, 8 U.S.C. 1252b 25
§ 243(h), 8 U.S.C. 1253(h) 27
§ 243(h)(2)(B), 8 U.S.C. 1253(h)(2)(B) 27
§ 244(a)(2), 8 U.S.C. 1254(a)(2) 27
§ 276, 8 U.S.C. 1326 ..... 2, 3, 6, 23
Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 224(a), 108 Stat. 4322-4324 ..... 2, 34
Parole Commission and Reorganization Act, Pub. L. No. 94-233, § 2, 90 Stat. 227 (1976) 22
Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987 22
§ 212(a)(2), 98 Stat. 1999 ..... 19, 22
§ 218(a)(5), 98 Stat. 2027 22
§ 220(b), 98 Stat. 2028 19
§ 235, 98 Stat. 2031 22
Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796:
§§ 130001-130010, 108 Stat. 2023-2031 2
§ 130004, 108 Stat. 2026-2028 34
8 U.S.C. 155 (1940) 8, 31, 32, 33
18 U.S.C. 716 (1925) 21
18 U.S.C. 1344 7
18 U.S.C. 3563(b)(21) 38
18 U.S.C. 3583 ..... 1, 14, 15, 1a
18 U.S.C. 3583(a) 14, 1a
18 U.S.C. 3583(b) 15, 1a
18 U.S.C. 3583(c) 15
18 U.S.C. 3583(d) ..... *passim*, 1a
18 U.S.C. 3583(e) 14, 20
18 U.S.C. 3583(e)(1) 14
18 U.S.C. 3583(e)(2) 14
18 U.S.C. 3583(e)(3) 14, 23

Statutes and regulations—Continued:	Page
18 U.S.C. 3601	14
18 U.S.C. 3603(2)	18
18 U.S.C. 3603(3)	18
18 U.S.C. 3603(5)	18
18 U.S.C. 3603(7)	18
18 U.S.C. 4204 (1952)	22
18 U.S.C. 4212 (1976)	22
8 C.F.R.:	
Pt. 208	26
Pt. 212:	
Section 212.14	28
Pt. 242	26
Pt. 243	26
Pt. 244	26
Pt. 245	26
Miscellaneous:	
138 Cong. Rec. (daily ed. Sept. 28, 1996):	
pp. H11,787-H11,833	2
p. H11,801	20
p. H11,803	31
pp. H11,803-H11,804	20
p. H11,804	31
p. H11,808	3
pp. H11,813-H11,814	34, 38
p. H11,814	38
H.R. Rep. No. 1035, 71st Cong., 2d Sess. (1930)	21
S. Rep. No. 1733, 71st Cong., 3d Sess. (1931)	21
2B Norman J. Singer, *Sutherland Statutory Construction* (5th ed. 1992)	37
The Oxford English Dictionary (2d ed. 1989):	
Vol. 10	17
Vol. 12	17

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OPINION BELOW

The opinion of the court of appeals (J.A. 15-16) is unpublished, but the judgment is noted at 55 F.3d 638 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1995. A petition for rehearing was denied on January 22, 1996. J.A. 17-18. The petition for a writ of certiorari was filed on April 19, 1996. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of Section 3583 of Title 18 are reprinted at App., *infra*, 1a-2a.

STATEMENT

Following a plea of guilty in the United States District Court for the Northern District of Georgia, petitioner was convicted of unlawfully entering the United States, in violation of 8 U.S.C. 1326. The district court sentenced petitioner to 16 months' imprisonment, to be followed by a three-year term of supervised release which included, as a special condition, that petitioner be deported. J.A. 10-14. The court of appeals affirmed, finding the condition authorized under 18 U.S.C. 3583(d). J.A. 15-16.[1]

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[1] This case involves the interaction of Section 3583(d) and the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* Congress has amended the INA in significant respects since the district court entered judgment in this case on April 28, 1994. On September 13, 1994, Congress enacted the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 130001-130010, 108 Stat. 2023-2031, which included, *inter alia*, a provision for the expeditious deportation of certain criminal aliens. On October 24, 1994, Congress enacted the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 224(a), 108 Stat. 4322-4324, which added, *inter alia*, a provision for judicial deportation in certain cases, upon the request of the United States Attorney and the concurrence of the Commissioner of the INS, as discussed at pp. 33-37, *infra*. On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, §§ 431-443, 110 Stat. 1273-1281, which amended, *inter alia*, provisions of the INA to limit judicial review of final administrative orders of deportation in cases involving aliens convicted of certain offenses. Most recently, on September 30, 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, Div. C, 110 Stat. ___ (*reproduced at* 138 Cong. Rec. H11,787-H11,833 (daily ed. Sept. 28, 1996)), which provides, *inter alia*, for elimination of judicial review of many of the determinations made by the Attorney General during

1. Petitioner, a Nigerian citizen, previously had been convicted of bank fraud, forgery, theft by taking, and bad check offenses, and had been deported to Nigeria on November 20, 1991. See Oct. 19, 1993, Crim. Complaint; Gov't C.A. Br. 2, 8. On October 12, 1993, petitioner was found in the United States and, on November 16, 1993, was indicted on one count of having entered the United States, without consent of the Attorney General, after having been previously deported, in violation of 8 U.S.C. 1326. See Oct. 19, 1993, Crim. Complaint; J.A. 2. On January 18, 1994, he entered a plea of guilty. J.A. 15; Gov't C.A. Br. 2. In the presentence report (PSR), the probation officer included the following condition of supervised release:

> Upon completion of the imprisonment portion of the sentence, the defendant shall be deported from the United States pursuant to 18 usc 3583(d). He/she shall be delivered to a duly-authorized Immigration official for such deportation and shall be detained in the custody of the Immigration and

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deportation proceedings and, as discussed at pp. 37-38, *infra*, for judicial deportation orders based on stipulations and as a condition of probation, upon concurrence of the Attorney General or her delegates. Most of the relevant portions of the IIRAIRA do not become effective until April 1, 1997, see IIRAIRA § 309 (*reproduced at* 138 Cong. Rec. H11,808 (daily ed. Sept. 28, 1996)). Unless otherwise indicated, all references to the INA are to the version in effect at the time of petitioner's sentencing. For purposes of this brief, we use the pre-IIRAIRA terminology that governed the proceedings below, and our references to administrative proceedings and judicial review are to the pre-IIRAIRA procedures unless otherwise indicated.

Naturalization Service until deported from the United States.

Gov't C.A. Br. 3; PSR 10 (Worksheet D). Petitioner did not object to that portion of the PSR. PSR 12.

The district court sentenced petitioner to 16 months' imprisonment, to be followed by three years' supervised release. J.A. 11-12. In accordance with the probation officer's recommendation, the court directed, as a condition of supervised release, that petitioner "be deported from the United States pursuant to 18 United States Code, Section 3583(d)." J.A. 9. The court ordered that petitioner "shall depart the United States when ordered to do so by the Immigration and Naturalization Service * * * [and] shall take no action to appeal or resist any order of deportation by the Immigration and Naturalization Service and if deported, shall not reenter the United States during the term of supervised release." J.A. 12.

2. Petitioner appealed, contending, *inter alia*, that the district court's order of deportation, as a condition of supervised release under 18 U.S.C. 3583(d), exceeded the court's authority. Pet. C.A. Br. 2, 7-15. The United States and the court of appeals similarly interpreted the order as an order of judicial deportation under Section 3583(d). See Gov't C.A. Br. 2; J.A. 15-16.

The court of appeals affirmed, based on its earlier ruling in *United States* v. *Chukwura*, 5 F.3d 1420 (11th Cir. 1993), cert. denied, 115 U.S. 102 (1994), that a district court is authorized by Section 3583(d) to order deportation as a condition of supervised release. J.A. 15-16. In its brief on appeal, the government informed the court that it had reconsidered its interpretation of Section 3583(d) and had concluded that Section 3583(d) does not authorize a sentencing court to order an alien defendant deported without affording him an opportunity to invoke the standards and procedures of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* See Gov't C.A. Br. 5-7.[2] The court of appeals acknowledged the change in the government's position, but concluded that it was not free to overrule *Chukwura* and affirmed petitioner's sentence. J.A. 16.[3]

[2] Initially, in the *Chukwura* case in the court of appeals, the United States had taken the position that Section 3583(d) authorizes a district court to order an alien defendant deported without resort to the standards and procedures of the INA. The United States had taken the contrary position, however, in the First Circuit in *United States* v. *Sanchez*, 923 F.2d 236 (1991), and had argued that Section 3583(d) does *not* authorize a district court to order the deportation of an alien defendant. The courts of appeals in each instance agreed with the view advocated by the United States. In light of the inconsistent positions taken by the United States in the two circuits, the conflicting circuit rulings that resulted, and the responsibilities of the Attorney General and the Immigration and Naturalization Service in administering the INA, the United States reexamined its views in responding to the petition for a writ of certiorari in *Chukwura*. We concluded that, contrary to the position adopted by the Eleventh Circuit, Section 3583(d) does not authorize a district court to order the actual deportation of an alien in a manner that bypasses the deportation proceedings established by the INA. This Court ultimately denied review in *Chukwura* and in another case from the Eleventh Circuit in which the petitioner had raised the same issue in a petition for a writ of certiorari before judgment, *Chatima* v. *United States*, cert. denied, 115 S. Ct. 352 (1994) (No. 94-5633).

[3] Petitioner had also contended that the district court had erred in failing to make findings of fact as to his deportability and in failing to consider the possibility of suspension of deportation. The court of appeals declined to address those issues

3. The court of appeals denied petitioner's petition for rehearing and suggestion for rehearing en banc on January 22, 1996. J.A. 17-18.

Petitioner had completed service of his term of imprisonment for his 1994 conviction under Section 1326 in December 1994. At that point, INS conducted proceedings concerning his deportation.[4] On April 10, 1996, however, after he was arrested on criminal charges in another district (see note 5, *infra*), the district court in the instant case entered an order revoking petitioner's supervised release. The order does not recite the grounds for revocation. The probation officer's petition for revocation cited four grounds, none of which was the fact that petitioner had not been deported. The court imposed a sentence of 12 months' imprisonment upon revocation, but it did not impose a new term of supervised release.

The order of the district court revoking petitioner's supervised release and ordering his imprisonment raises a question of mootness. It is unclear whether the district court contemplated that petitioner would be deported under the original sentence imposing deportation as a condition of supervised release, now that petitioner's supervised release has been revoked. Accordingly, it is not clear whether

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because petitioner had not raised them in the district court. See J.A. 16 n.1.

[4] Upon completion of his term of imprisonment, petitioner was surrendered to the INS pursuant to an INS detainer and released on bond. On June 5, 1995, an immigration judge entered a warrant of deportation ordering the INS to arrest and deport petitioner. On February 1, 1996, an immigration judge denied petitioner's motion to reopen his deportation proceedings. On March 6, 1996, petitioner was arrested pursuant to the warrant of deportation.

a successful challenge to the deportation condition would have any effect on petitioner's sentence. Moreover, the Eleventh Circuit does not appear to have addressed the issue of whether an order of judicial deportation under its interpretation of Section 3583(d) may be carried out following the revocation of a defendant's supervised release and the completion of the term of his imprisonment imposed upon revocation, where, as here, there is no new term of supervised release.[5]

4. a. Meanwhile, on November 13, 1995, the court of appeals granted rehearing en banc in consolidated appeals in which two alien defendants had raised the same challenge to the authority of a district court to enter a judicial deportation order as a condition of supervised release under Section 3583(d), and had urged the court of appeals to overrule *Chukwura*.

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[5] Further, on March 18, 1996, a criminal complaint was filed in the United States District Court for the Northern District of Alabama, charging petitioner with having committed bank fraud, in violation of 18 U.S.C. 1344. A magistrate judge of that court issued a warrant for petitioner's arrest which was executed on March 21, 1996. After his indictment on a variety of federal charges, petitioner pleaded guilty to all counts and was sentenced to 24 months' imprisonment, to be followed by five years' supervised release. One of the conditions of his supervised release is that petitioner "shall be deported immediately upon completion of the term of imprisonment and shall remain outside the United States during the period of supervised release, in accordance with 18 USC 3583(d) and with *U.S. v. Chukwura*, 5 F.3d 1420 (11th Cir. 1993). To that end, [petitioner] shall be remanded to the custody of the U.S. Marshal Service for delivery to an authorized Immigration and Naturalization Service official for execution of the deportation order." *United States* v. *Ogbomon*, No. CR 96-PT-124-NE (N.D. Ala. Aug. 29, 1996), at 3. That order is not before this Court.

See *United States* v. *Oboh*, 70 F.3d 87 (11th Cir. 1995) (vacating the panel opinion in *United States* v. *Oboh*, 65 F.3d 900 (11th Cir. 1995), and ordering that the case be reheard by the court en banc).

On rehearing en banc in *Oboh*, the court of appeals, by a 7-5 vote, reaffirmed *Chukwura*, despite contrary rulings by three other courts of appeals. *United States* v. *Oboh*, 92 F.3d 1082, 1083 (11th Cir. 1996) (acknowledging conflicting rulings in *United States* v. *Sanchez*, 923 F.2d 236 (1st Cir. 1991); *United States* v. *Xiang*, 77 F.3d 771 (4th Cir. 1996); and *United States* v. *Quaye*, 57 F.3d 447 (5th Cir. 1995)), petitions for cert. pending, Nos. 96-6653 & 96-6658 (filed Nov. 6, 1996). The *Oboh* majority found that the language of Section 3583(d) supported its conclusion that a district court is authorized to order an alien's deportation as a condition of supervised release. 92 F.3d at 1084. It noted that other circuits had rejected that conclusion after interpreting Section 3583(d) in light of the traditional allocation of power between the Executive and Judicial Branches, which grants the Executive sole authority to make deportation decisions. The *Oboh* majority viewed that allocation of power differently, however, relying on an earlier provision of the INA (former 8 U.S.C. 155 (1940); 8 U.S.C. 1251(b)(2) (1988)) that authorized a sentencing court to issue a judicial recommendation against deportation to bar the INS from using the conviction underlying that particular criminal sentence as a basis for deportation. 92 F.3d at 1086. The court viewed Congress's abolition of the courts' recommendation authority in 1990 and its enactment of Section 3583(d) a few years earlier to indicate not only that "Congress intended to enable district courts to order the deportation of defendants 'subject to deportation,' but

[that Congress] in fact favors such deportation when either the Executive or Judicial Branch deems it appropriate." *Id.* at 1087.

The *Oboh* majority found further support in Congress's subsequent enactment of Section 242A(d) of the INA, 8 U.S.C. 1252a(d), which authorizes district courts to order the deportation of alien defendants upon the request of the United States Attorney and the concurrence of the Commissioner of the INS. 92 F.3d at 1087. The court rejected the defendants' arguments that judicial deportation under Section 3583(d) did not afford them the procedural safeguards established in the INA. The court noted that procedural safeguards exist in the sentencing process through appellate review and that, although greater procedural safeguards are available under the INA, that was a matter for Congress, not the court, to decide. *Ibid.*

The court of appeals rejected appellant Oboh's argument that the district court's deportation order had denied him due process because he had not been given adequate notice of the deportation determination and had not been afforded an opportunity to present evidence or to argue that he is not subject to deportation. 92 F.3d at 1087-1088. The court found that the language of Section 3583(d) gave Oboh sufficient notice that the district court could deport him as a condition of supervised release. *Id.* at 1088. The court also found the evidence sufficient to establish that Oboh was subject to deportation, in that the United States had introduced at the sentencing hearing an INS document that revealed that Oboh had entered the United States unlawfully. *Id.* at 1087-1088 The court noted that the appellant in the other

case, which had been consolidated for purposes of rehearing en banc, did not challenge the fact that he was subject to deportation or the notice and opportunity provided him regarding relief from deportation under the INA. *Id.* at 1087 n.8.

b. Five members of the court of appeals dissented, agreeing with the First, Fourth, and Fifth Circuits that Section 3583(d) "provides only that a defendant who is subject to deportation may be surrendered to the INS for deportation proceedings in accordance with" the INA. 92 F.3d at 1088 (Barkett, J., dissenting, joined by Kravitch, Anderson, Birch, and Carnes, JJ.). The dissent emphasized that Section 3583(d) authorizes district courts to "provide" that alien defendants be deported as a condition of supervised release, but does not authorize district courts to "order" deportation. *Ibid.* Construing that language to permit, but not to order, deportation accords with the overall purpose of Section 3583(d), because it clarifies that a court may allow the INS to deport an alien notwithstanding the fact that he is serving a term of supervised release. *Id.* at 1089. The dissent also explained that its interpretation "conforms with the uniform historical practice of Congress conferring on Executive Branch officials the authority to institute deportation proceedings against an alien." *Ibid.* Noting that Congress has vested immigration authority in the Attorney General and has established the administrative procedures that govern her deportation determinations, the court concluded that the single sentence in Section 3583(d) referring to deportation did not "carve out an exception to the Attorney General's authority over immigration matters." *Ibid.*

The dissent viewed its interpretation to be consistent with the background of Section 3583(d) and its predecessor statutes which did not authorize judicial orders of deportation. It also noted that courts had in many contexts held that district courts historically have lacked the authority to order the deportation of a criminal defendant, and it found its reading of Section 3583(d) to be consistent with that body of authority. 92 F.3d at 1090-1091. Finally, the dissent relied on Congress's subsequent enactment of Section 1252a(d), which authorizes judicial deportation of aliens in cases involving certain serious offenses, but only upon the request of the United States Attorney and with the concurrence of the INS. The dissent concluded that, in light of that amendment, to read a general power of judicial deportation into Section 3583(d) would produce an absurd result: aliens convicted of less serious crimes could be deported by judicial order without the procedural safeguards afforded by Section 1252a(d) to aliens convicted of more serious crimes. *Id.* at 1091-1092 (citing, *inter alia*, *United States* v. *Quaye*, 57 F.3d at 450; *United States* v. *Xiang*, 77 F.3d at 773).

SUMMARY OF ARGUMENT

Section 3583(d) of Title 18 does not authorize a district court to order an alien defendant deported as a condition of supervised release without recourse to the standards and procedures for deportation determinations established by the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and its implementing regulations. Rather, Section 3583(d) authorizes a sentencing court to "provide" for deportation, if the alien is subject to it, *i.e.*, to permit a

determination by the Attorney General whether an alien defendant is subject to deportation under the INA and to order an alien surrendered to immigration officials for that purpose and for deportation. That interpretation of Section 3583(d), adopted by the other four circuits that have addressed the question, is consistent with the text, purpose, history, and structure of Section 3583(d).

The court of appeals' view that Section 3583(d) authorizes a district court to enter a deportation order as a condition of supervised release runs counter to Congress's long-standing practice of vesting sole authority for immigration matters, including deportation determinations, in the Attorney General and her delegates. It also is inconsistent with the structure of Section 3583(d), which authorizes a district court to take certain actions with regard to deportation only "[i]f an alien defendant is subject to deportation." 18 U.S.C. 3583(d). Whether an alien is subject to deportation can be answered only under the INA, in which Congress has identified what classes of persons are deportable, what circumstances may warrant relief from deportation, and what procedures the Attorney General must follow in making those determinations. Consequently, Section 3583(d) and the INA must be construed together so as to give effect to both. Read against that backdrop, the single sentence in Section 3583(d) concerning aliens subject to deportation does not sanction the entry of judicial deportation orders that bypass the INA proceedings administered by the Attorney General and the statutory standards governing deportability and relief from deportation. Recent statutory enactments regarding judicial deportation orders confirm that,

when Congress intends to grant district courts jurisdiction to enter judicial deportation orders, it does so explicitly and provides for a means by which the approval of the Attorney General, or her delegates, is required to obtain such a deportation order.

ARGUMENT

SECTION 3583(d) OF TITLE 18 DOES NOT AUTHORIZE A DISTRICT COURT TO ORDER THE DEPORTATION OF AN ALIEN DEFENDANT AS A CONDITION OF SUPERVISED RELEASE

The court of appeals interpreted Section 3583(d) to permit a district court to order an alien defendant deported without reliance on the standards and procedures of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* The other four circuits that have considered the question have disagreed with the Eleventh Circuit's interpretation and have held that Section 3583(d) does not give a district court such authority, but does authorize a court "to impose as a condition of supervised release that a defendant be delivered to the INS for deportation proceedings consistent with the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101-1524." *United States* v. *Phommachanh*, 91 F.3d 1383, 1385 (10th Cir. 1996); accord *United States* v. *Xiang*, 77 F.3d 771, 772 (4th Cir. 1996); *United States* v. *Quaye*, 57 F.3d 447, 449-451 (5th Cir. 1995); *United States* v. *Ramirez*, 948 F.2d 66, 68 (1st Cir. 1991); *United States* v. *Sanchez*, 923 F.2d 236, 237 (1st Cir. 1991); see also *United States* v. *Kassar*, 47 F.3d 562, 568 (2d Cir. 1995). Those other circuits are correct.

A. The Text, Purpose, And History Of Section 3583(d) Establish That A District Court May Provide For Deportation Of An Alien Defendant By The Attorney General If The Alien Is Subject To Deportation Under The Immigration And Nationality Act, Notwithstanding Other Terms Of Supervised Release, But The District Court Is Not Authorized To Order The Deportation Of An Alien

1. Section 3583 of Title 18 authorizes, and in some instances mandates, federal district courts to include, as a part of a criminal defendant's sentence to a term of imprisonment, a requirement that the defendant be placed on a term of supervised release after imprisonment. 18 U.S.C. 3583(a). A term of supervised release constitutes a period of time during which a person released from prison is subject to supervision by a probation officer. 18 U.S.C. 3601. The degree of supervision is determined according to the conditions specified by the sentencing court. *Ibid.* Violation of a term of supervised release may result in the modification of the conditions of supervised release or the revocation of supervised release. 18 U.S.C. 3583(e).[6]

[6] If supervised release is revoked, the person is returned to prison to serve all or part of the term of supervised release authorized by statute for the initial offense that resulted in the supervised release, without credit for the time served on release, subject to certain statutory maximum terms. 18 U.S.C. 3583(e)(3). In lieu of revocation, district courts may extend a term of supervised release if less than the maximum authorized term was previously imposed. 18 U.S.C. 3583(e)(2). If the conduct of a person on supervised release merits favorable action, a district court may terminate a term of supervised release early and discharge the person at any time after the expiration of one year of supervised release. 18 U.S.C. 3583(e)(1).

The district court's authority to impose a term of supervised release is limited in numerous respects by Section 3583. For example, Section 3583(b) establishes the maximum length of the term of supervised release that a district court is authorized to impose in different categories of cases. Section 3583(c) mandates that a district court consider a specific list of factors when determining whether to include a term of supervised release, the length of such a term, and the conditions to impose on the term of release in a particular case.

Section 3583(d) addresses the various conditions that a district court may, and in some instances must, impose on the term of supervised release. It authorizes district courts to impose three types of conditions on supervised release. First, it requires that certain mandatory conditions be imposed in all cases. It states that the district court "shall order, as an explicit condition of supervised release," that the defendant not commit another crime, that he or she not unlawfully use or possess a controlled substance, and that he or she submit to periodic drug testing.[7] Second, Section 3583(d) grants district courts discretion to impose additional conditions. It states that a district court "may order, as a further condition of supervised release," certain conditions that are set forth as discretionary conditions for probation and "any other condition it considers to be appropriate," to the extent such condition is reasonably related to particular sentencing factors, involves

[7] Section 3583(d) imposes certain other mandatory conditions in cases involving domestic violence crimes.

no greater deprivation of liberty than necessary, and is consistent with the Sentencing Commission's policy statements. Third, Section 3583(d) states that

> [i]f an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that [the alien] be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

Section 3583(d) does not authorize a district court to *order* an alien defendant deported as a condition of supervised release. Whereas Congress used the verb "order" to describe what a district court is authorized to do in imposing the listed mandatory and discretionary conditions, it did not use that verb to describe what a district court is authorized to do with regard to deportation of an alien. Instead, Congress used the verb "provide." Congress's intent to convey a different meaning by its use of a different verb is apparent from the fact that it also used the verb "order" in that final sentence, but only to authorize the court to order the delivery of a defendant to an immigration official for deportation. The Tenth Circuit succinctly analyzed the terms used in the final sentence of Section 3583(d) as follows:

> By using two different verbs to describe what a district court may do under § 3583(d), Congress presumably intended the verbs to convey their respective meanings. * * * The verb "provide" is defined as "[t]o exercise foresight in taking due measures in view of a possible event;" * * * whereas the verb "order" is defined as "[t]o . . . command [or] authoritatively direct." * * * Had Congress intended that § 3583(d) allow the sentencing court to *order*, or "authoritatively direct," deportation, it could have easily so stated. However, its choice of the verb "provide" connotes a different, presumably intended, meaning; it allows the sentencing court "[t]o exercise foresight . . . in view of a possible event," * * * by directing that in the event that the INS determines that the defendant-alien is "subject to deportation" upon release from prison, *see* 18 U.S.C. § 3583(d), then the defendant-alien is to be deported.

United States v. *Phommachanh*, 91 F.3d at 1385-1386 (quoting 10 *The Oxford English Dictionary* 907 (2d ed. 1989); 12 *id.* at 713); see also *United States* v. *Xiang*, 77 F.3d at 772; *United States* v. *Quaye*, 57 F.3d at 449; *United States* v. *Oboh*, 92 F.3d 1082, 1088 (11th Cir. 1996) (Barkett, J., dissenting, joined by Kravitch, Anderson, Birch, and Carnes, JJ.), petitions for cert. pending, Nos. 96-6653 & 96-6658 (filed Nov. 6, 1996).

2. Examination of the purpose and history of Section 3583(d) demonstrates that Congress did not intend that the final sentence of Section 3583(d) be interpreted beyond its plain meaning to extend to judicial deportation orders. Rather, that provision was intended to harmonize the government interests served by supervised release with those furthered by deportation of criminal aliens.

a. Supervised release is intended to ensure that a person released from prison and placed back into the community is supervised by a probation officer. The duties of a probation officer who is supervising a released person include, for example, keeping informed of the supervisee's conduct, condition, and work and

reporting such information to the sentencing court; assisting the supervisee to improve his conduct and condition; and keeping informed of the supervisee's compliance with the conditions of release, including payment of fines or restitution, and reporting such information to the sentencing court. 18 U.S.C. 3603(2), (3), (5), and (7). In order to facilitate such supervision, the standard conditions of supervised release generally include, *inter alia*: a prohibition against the supervisee leaving the judicial district without permission of the court or the probation officer; a requirement that the supervisee report, in person, to the probation officer on a periodic basis; and a requirement that the supervisee permit a probation officer to visit him at any time at home, or any other place, and permit confiscation of any contraband observed by the officer. See, *e.g.*, J.A. 13-14.

Deportation of a supervisee would be inconsistent with many conditions of supervised release. Deportation would make it impossible for the supervisee to comply with conditions such as reporting, in person, to a probation officer or having a probation officer visit the supervisee's home or workplace. It also would make it impossible for a probation officer to fulfill various statutory duties of supervision, such as assisting the supervisee to improve his condition and conduct and keeping apprised of the supervisee's whereabouts and work habits.

Thus, "[w]ithout a provision such as the last sentence of § 3583(d), 'administrative' deportation by the INS might be regarded as inconsistent with *judicially supervised* release." *United States* v. *Oboh*, 92 F.3d at 1089 (Barkett, J., dissenting, joined by Kravitch, Anderson, Birch, and Carnes, JJ.). Express

congressional authorization for courts to provide for deportation as a condition of supervised release was necessary to ensure that supervised release would not stand as an obstacle to deportation of an alien defendant merely because he had not yet completed his full supervised release term. Thus, the final sentence of Section 3583(d) makes clear that a court can provide for deportation of an alien defendant by the Attorney General if the alien is subject to deportation under the INA, notwithstanding that deportation would make it impossible for certain other conditions of supervised release to be met.

Further support for that interpretation of Section 3583(d) is found in the fact that, at the same time Congress enacted Section 3583(d), it amended Section 242(h) of the INA to specify that supervised release is not "a ground for deferral of deportation." 8 U.S.C. 1252(h). See Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, § 212(a)(2), 98 Stat. 1999 (enacting Section 3583(d) of Title 18); *id.* § 220(b), 98 Stat. 2028 (amending Section 242(h) of the INA). The amendment provided that, unlike a term of imprisonment (which precluded deportation until the full term has been served), the new sanction of supervised release was to be treated like parole and probation, which do not preclude the deportation of an alien. As amended, Section 242(h) provided:

> An alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated by the release of the alien from confinement. Parole, supervised release, probation, or possibility of rearrest or further confinement

> in respect of the same offense shall not be a ground for deferral of deportation.

8 U.S.C. 1252(h).[8] Read in conjunction with that contemporaneously enacted provision, Section 3583(d) is best interpreted as confirmation that deportation of a criminal alien during supervised release could proceed under the INA, notwithstanding that such deportation would be inconsistent with other terms of release.[9]

b. The history of Section 3583(d) and its predecessor statutes indicates that Section 3583(d) was

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[8] The AEDPA subsequently amended Section 242(h) of the INA to permit the deportation of criminal aliens before the completion of a term of imprisonment in certain cases involving nonviolent offenses if it would serve the best interests of the United States. See AEDPA § 438(a), 110 Stat. 1275 (adding subsection (2), 8 U.S.C. 1252(h)(2)). The IIRAIRA rewrote Section 242 of the INA in its entirety. See IIRAIRA § 306 (*reproduced at* 138 Cong. Rec. H11,803-H11,804 (daily ed. Sept. 28, 1996)). Similar substantive provisions are now found in Section 241(a)(4) of the INA, as added by Section 305(a)(3) of the IIRAIRA (*reproduced at* 138 Cong. Rec. H11,801 (daily ed. Sept. 28, 1996)) (to be codified at 8 U.S.C. 1251(a)(4)).

[9] As the dissenters in *Oboh* point out, the fact that Section 3583(d) specifies that a court may provide that an alien defendant be deported "as a condition of supervised release" also weighs against an interpretation of that section to authorize a court to enter a judicial order of deportation. See *United States* v. *Oboh*, 92 F.3d at 1088-1089. By stating that the court may include deportation as a condition of supervised release, it implies that the consequence of a failure to satisfy that condition is that the court may revoke or modify the defendant's supervised release, see 18 U.S.C. 3583(e), not that the court may order the Attorney General to make a determination that deportation is warranted and deport the defendant. 92 F.3d at 1088-1089; cf. *United States* v. *Quaye*, 57 F.3d at 449.

intended to authorize a district court to provide for the Attorney General's deportation determination under the INA, not to authorize the district court to order deportation directly. The initial predecessor of the current Section 3583(d) was enacted in 1931, as an amendment to 18 U.S.C. 716 (1925), which governed the parole of prisoners. The amendment provided that

> where a Federal prisoner is an alien and subject to deportation the board of parole may authorize the release of such prisoner after he shall have become eligible for parole on condition that he be deported and remain outside of the United States and all places subject to its jurisdiction, and upon such parole becoming effective said prisoner shall be delivered to the duly authorized immigration official for deportation.

Act of Mar. 2, 1931, ch. 371, 46 Stat. 1469. The committee reports accompanying that 1931 amendment explained that, because the then-current rules governing parole required that a prisoner remain within the jurisdiction of the court, an alien prisoner, who would be deported if paroled, could not be paroled because it was known that he would not be remaining in the court's jurisdiction. See S. Rep. No. 1733, 71st Cong., 3d Sess. 1 (1931); H.R. Rep. No. 1035, 71st Cong., 2d Sess. 1 (1930). The 1931 amendment established a means by which the parole board could facilitate deportation by immigration officials before completion of the service of the alien's full term of imprisonment. It did not, however, authorize the parole board to order the deportation of an alien and supplant the normal deportation procedures. See *United States* v. *Quaye*, 57 F.3d at 450; *Secchi* v. *U.S.*

Bureau of Immigration, 58 F. Supp. 569 (M.D. Pa. 1945).

The provision was subsequently recodified at 18 U.S.C. 4204 (1952), see Act of June 25, 1948, ch. 645, § 1, 62 Stat. 854, and later at 18 U.S.C. 4212 (1976), see Parole Commission and Reorganization Act, Pub. L. No. 94-233, § 2, 90 Stat. 227 (1976). Section 4212 was repealed by the Sentencing Reform Act of 1984, which replaced the system of indeterminate sentencing and parole with sentencing under the Sentencing Guidelines and created supervised release, including the current Section 3583(d), at issue here. See Pub. L. No. 98-473, Tit. II, Ch. II, §§ 212(a)(2), 218(a)(5), 235, 98 Stat. 1999, 2027, 2031. The committee reports accompanying the Sentencing Reform Act do not specifically discuss the final sentence of Section 3583(d) concerning deportation of aliens, but it is obvious that that sentence was patterned after the former Section 4212.[10] Those origins indicate that Section 3583(d), like its predecessor that governed parole, does not authorize a judicial order of deportation. Instead, it preserves the established authority of the Attorney General to effect the deportation of an alien and provides for carrying out such an order without violating the statutory terms of supervised release. See *United States* v. *Quaye*, 57 F.3d at 450; *United States*

[10] The former 18 U.S.C. 4212 (1976), as in effect when the Sentencing Reform Act was passed, provided:

> When an alien prisoner subject to deportation becomes eligible for parole, the Commission may authorize the release of such prisoner on condition that such person be deported and remain outside the United States.
>
> Such prisoner when his parole becomes effective, shall be delivered to the duly authorized immigration official for deportation.

v. *Oboh*, 92 F.3d at 1090-1091 (dissenting opinion). As the Fifth Circuit describes Section 3583(d), it "paves the way for Executive Branch deportation proceedings; it does not permit courts to order deportation alone." *United States* v. *Quaye*, 57 F.3d at 450 (the history of Section 3583(d) presents "a powerful argument that Congress never intended to alter th[e] traditional allocation of power between Article II and Article III branches of government").[11]

B. The Determination Whether An Alien Defendant Is Subject To Deportation For Purposes Of Section 3583(d) Must Be Made Under The Immigration And Nationality Act

Despite the text, purpose, and history of Section 3583(d), the court of appeals declined to adopt what we believe is the most natural reading of the final sentence of Section 3583(d). Instead, the court read into that sentence a grant of jurisdiction to a district court to enter a final deportation order without invocation of the standards or procedures of the INA.

[11] In addition to ensuring that a term of supervised release does not stand as an obstacle to the deportation of an alien defendant, Section 3583(d) serves the government's purpose of establishing an efficient means of reimprisoning an alien defendant who reenters the United States during such term. In addition to authorizing a district court to provide for deportation, Section 3583(d) authorizes a district court to provide that an alien defendant, who is subject to deportation, must remain outside the United States during the period of his supervised release. Consequently, if such an alien defendant reenters the United States, the United States may arrest that alien for violation of a condition of supervised release and reimprison him in accordance with Section 3583(e)(3), without having to pursue a new and independent criminal prosecution under 8 U.S.C. 1326, for unlawful reentry after deportation.

Such a reading runs contrary to Congress's long-standing practice of vesting sole authority to make deportation determinations in the Attorney General and her delegates. It also conflicts with the structure of Section 3583(d), which authorizes a district court to take certain actions with regard to deportation only "[i]f an alien defendant is subject to deportation." 18 U.S.C. 3583(d). Whether an alien is subject to deportation can be answered only by reference to the INA, in which Congress has identified the grounds for deportability and for relief from deportation, as well as the procedures to be followed in determining whether to enter an order of deportation. Consequently, Section 3583(d) and the INA must be construed together so as to give effect to both. See *United States* v. *Sanchez*, 923 F.2d at 237 ("As subsection 3583(d) provides no indication of a contrary legislative design, we read its language *in pari materia* with the provisions of the Immigration and Naturalization Act."); *United States* v. *Phommachanh*, 91 F.3d at 1386 ("18 U.S.C. § 3583(d) and 8 U.S.C. § 1251 are *in pari materia*, and as such, must be read and applied together.").

1. The determinations of whether an alien is deportable and whether an alien is entitled to a waiver of deportation or to other relief from deportation are matters that Congress has assigned, by statute, to the Attorney General (with the exception of 8 U.S.C. 1252a(d), discussed at pp. 33-38, *infra*). See 8 U.S.C. 1251-1254. Congress's assignment of that authority to the Attorney General and her delegates is consistent with the broad authority that Congress has vested in the Attorney General in immigration

matters generally. Section 103(a) of the INA provides, in relevant part:

> The Attorney General shall be charged with the administration and enforcement of this chapter *and all other laws relating to the immigration and naturalization of aliens*, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

8 U.S.C. 1103(a) (emphasis added). In particular, Congress specified that the procedures entrusted to the Attorney General under Section 242 of the INA, 8 U.S.C. 1252, for determination of deportability through an administrative proceeding, subject to judicial review, "shall be the sole and exclusive procedure for determining the deportability of an alien under this section," 8 U.S.C. 1252(b), "[e]xcept as provided in section 1252a(d)" (discussed below).[12] Congress vested the Attorney General with the authority to establish such regulations as she deems necessary for carrying out her authority under the INA. 8 U.S.C. 1103(a). Pursuant to that authority, the

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[12] The procedures that the Attorney General is required to administer under Section 1252 include providing notice to the alien of the charges; permitting the alien to hire a lawyer to represent him; allowing the alien to examine the government's evidence, present his own evidence, and cross-examine government witnesses; and requiring that the deportation determination be based upon substantial evidence. See 8 U.S.C. 1252(b)(1)-(4); see also 8 U.S.C. 1252b.

Attorney General has promulgated regulations to govern, *inter alia*, the proceedings to determine the deportability of aliens and the means for carrying out deportation orders (8 C.F.R. Pts. 242 and 243), as well as the procedures for seeking and granting asylum, withholding of deportation, suspension of deportation, voluntary departure, and adjustment of status to permanent resident (8 C.F.R. Pts. 208, 244 and 245).

As the official charged with administering the INA, the Attorney General's statutory interpretations are entitled to deference. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 445-450 (1987) (analyzing INS's statutory interpretation under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). Her formulation of the standards governing discretionary relief are subject to judicial review only for abuse of discretion. See *INS* v. *Yueh-Shaio Yang*, No. 95-938 (Nov. 13, 1996), slip op. 6; see also *INS* v. *Rios-Pineda*, 471 U.S. 444, 451 (1985) (the INA "commits the definition of the standards in the Act to the Attorney General and his delegate in the first instance, 'and their construction and application of th[ese] standard[s] should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute'" (quoting *INS* v. *Jong Ha Wang*, 450 U.S. 139, 144 (1981) (per curiam))).

Under the standards and procedures of the INA and its implementing regulations, in order to determine whether a person is subject to deportation, one must first ascertain whether the person falls within a class of deportable aliens. Section 241 of the INA, 8 U.S.C. 1251, details the various classes, including aliens convicted of certain criminal offenses. See 8 U.S.C. 1251(a)(2). Classification as a deportable alien does not subject an alien to deportation, however. Certain

grounds of deportation may be waived by the Attorney General under specified circumstances, as a matter of discretion. See, *e.g.*, 8 U.S.C. 1251(a)(1)(E)(iii) and (H), (c). More importantly, many aliens may seek relief from deportation through a number of different statutory provisions. For instance, a deportable alien may seek asylum (8 U.S.C. 1158), withholding of deportation (8 U.S.C. 1253(h)), suspension of deportation (8 U.S.C. 1254(a)(2)), or a determination of nonexcludability (8 U.S.C. 1182(c)). Although an alien must meet certain threshold statutory requirements in each instance, the ultimate determination of whether to grant relief or to subject the alien to deportation is often left to the discretion of the Attorney General. For example, this Court has described the Attorney General's suspension of deportation as "'an act of grace' which is accorded pursuant to her 'unfettered discretion.'" *INS* v. *Yueh-Shaio Yang*, slip op. 4 (quoting *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956)).

Other determinations by the Attorney General are far from discretionary, but rather mandated by provisions of the INA that implement the nation's treaty obligations, or by matters of foreign affairs. For example, if a deportable alien qualifies for withholding of deportation because his life or freedom would be threatened, on account of race, religion, nationality, membership in a particular social group, or political opinion, in the country to which he is to be deported, the Attorney General is statutorily prohibited from effectuating that deportation uniess one of the specified exceptions applies, such as commission of a particularly serious crime that renders him a danger to the community. See 8 U.S.C. 1253(h)(2)(B). The INA also affords the Attorney General the ability

to take into account other law enforcement interests in particular cases that may warrant the presence in this country, for a particular period of time, of an alien who is subject to deportation. See, *e.g.*, 8 U.S.C. 1182(d)(5); 8 C.F.R. 212.14 (providing for temporary parole in the United States of aliens whom a law enforcement authority requires to serve as witnesses or informants in criminal/counter-terrorism matters). Even if the Attorney General determines that an alien is deportable and not entitled to any of the discretionary relief provisions, the Attorney General may decide not to deport the alien if such deportation is not practicable, advisable or possible. See 8 U.S.C. 1252(c).

In light of the structure and history of the laws governing immigration and the role of the Executive Branch in conducting foreign affairs, it would be exceptional for Congress to have granted jurisdiction to district courts to decide matters that would have direct international implications by necessitating the transport of a person from this country to foreign soil, without requiring the consent of, or consultation with, the Attorney General. This Court previously has recognized that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952); see also *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-543 (1950) (the power to exclude aliens from the United States "is inherent in the executive power to control

the foreign affairs of the nation," and "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien"). Moreover, the grant of authority to the Attorney General to initiate deportation proceedings and to make deportation determinations is consistent with her general discretion regarding decisions to enforce the law, as well as the presumptive authority of Executive agencies to make nonenforcement decisions that are not subject to judicial review. See *Heckler* v. *Chaney*, 470 U.S. 821 (1985); cf. *Morrison* v. *Olson*, 487 U.S. 654 (1988).

2. a. The references to deportation in the final sentence of Section 3583(d) do not carve out an exception to that statutory scheme and long tradition of Attorney General authority in the realm of deportation. It is extremely unlikely that Congress, in a single sentence in Section 3583(d) that merely allows a district court to "provide" that an alien be deported, intended to repeal by implication the entire INA in a particular category of cases and to exempt those cases from the Attorney General's exclusive authority over deportation matters. It is also unlikely that Congress intended that Section 3583(d) render certain aliens altogether ineligible for relief from deportation under the INA provisions relating to asylum, withholding of deportation, and the like. But that would be the necessary result of the Eleventh Circuit's interpretation.[13]

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[13] Section 3583(d) contains no provision for the sentencing court to consider requests for asylum or other relief, nor does it authorize the court to exercise discretion to grant waivers of deportation as the INA authorizes the Attorney General to

Section 3583(d) should, instead, be interpreted to give effect to both its purpose and the purposes of the comprehensive provisions of the INA. As other courts of appeals have concluded, read *in pari materia* with the INA, Section 3583(d) can only be interpreted as authorizing the sentencing court to provide, as a condition of supervised release, that an alien defendant who is subject to deportation, *i.e.*, an alien who has been or will be ordered deported by the Attorney General under the INA, "be surrendered to immigration officials for deportation proceedings under the [INA] * * * for the purpose of determining whether he is 'an alien defendant . . . subject to deportation'" and for such deportation. *United States* v. *Sanchez*, 923 F.2d at 237; see also *United States* v. *Phommachanh*, 91 F.3d at 1386 (same).

That interpretation of Section 3583(d) "is consistent with the overall division of responsibility that Congress created between the INS and the courts." *United States* v. *Phommachanh*, 91 F.3d at 1386 (quoting *United States* v. *Xiang*, 77 F.3d at 772-773). As numerous courts of appeals have recognized, it preserves Congress's long tradition of granting the

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do. In order to effectuate the INA along with Section 3583(d), a district court would have to devise some means of replicating the administrative deportation hearing process or would have to stay its proceedings to afford an alien an opportunity to seek such relief through the INA structure. The Eleventh Circuit has not required that district courts provide alien defendants with an opportunity to seek such relief from deportation, however. The court of appeals recently affirmed a district court's refusal of an alien's request that it withhold its judicial deportation order to allow the INS to determine whether the alien was eligible for asylum under the INA. *United States* v. *Oboh*, 92 F.3d at 1083-1084.

Attorney General sole power to initiate deportation determinations. See *id.* at 1386-1387; *United States* v. *Quaye*, 57 F.3d at 449-450; cf. *United States* v. *Kassar*, 47 F.3d at 568 (decision to deport rests in sound discretion of Attorney General). It is consistent with the understanding that "the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953).[14] As the Fifth Circuit reasoned, courts should not assume "that Congress intended to undermine th[e] executive prerogative *sub silentio* in § 3583(d), or that Congress intended by its silence to deprive aliens deported at sentencing of such relief as alien asylum, which the Attorney General may grant." *United States* v. *Quaye*, 57 F.3d at 450. The Court should "insist on greater clarity of purpose when a statute would be read to upset a status quo long in place." *Ibid.*

b. The court of appeals erred in reading former provisions of the INA, which provided for judicial recommendations against deportation, as evidencing a congressional intent to enable district courts to enter orders directly deporting aliens. See *United States* v. *Oboh*, 92 F.3d at 1086-1087. The *Oboh* en banc majority cited former Section 155 of Title 8 (1940), which

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[14] In fact, Congress recently provided that discretionary decisions and actions by the Attorney General under the INA will no longer be subject to judicial review. See IIRAIRA § 306(a) (*reproduced at* 138 Cong. Rec. H11,803 (daily ed. Sept. 28, 1996)) (effective date April 1, 1997, see IIRAIRA §§ 306(c)(1), 309(a) (*reproduced at* 138 Cong. Rec. H11,804, H11,808 (daily ed. Sept. 28, 1996)) (as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657)).

provided that, in the case of an alien whose deportability was based on a conviction of a crime involving moral turpitude, the alien was not to be deported if the alien had been pardoned or if the sentencing court recommended against his deportation, after having given due notice to the responsible Executive Branch officials. The court noted that the pertinent part of Section 155 was replaced by Section 241(b) of the INA, 8 U.S.C. 1251(b) (1952). Section 1251(b) provided that the provision rendering an alien deportable on account of having committed certain crimes involving moral turpitude (Section 241(a)(4) of the INA, 8 U.S.C. 1251(a)(4) (1952)), did not apply if the alien was pardoned or if the sentencing court recommended against deportation, after having given notice to the INS, the prosecuting authorities, and the interested State, and after having provided those officials with an opportunity to make representations to the court on the matter.

Section 1251(b) did not prohibit the Attorney General from deporting any aliens, however, but merely authorized a sentencing court to preclude the INS from using a particular conviction as the statutory basis for finding the alien deportable under Section 1251(a). The Attorney General retained the authority to deport the alien on any other basis authorized under the INA. See *United States* v. *Quintana*, 914 F.2d 1409, 1410-1411 (10th Cir. 1990) (Section 1251(b) is inapplicable to deportation based on any ground other than Section 1251(a)(4)); *Jew Ten* v. *INS*, 307 F.2d 832 (9th Cir. 1962), cert. denied, 371 U.S. 968 (1963); *United States* v. *George*, 534 F. Supp. 570, 571 (S.D. N.Y. 1982). The Attorney General also retained the authority to consider the conduct underlying the conviction, and weigh it as an adverse factor

against the alien, when exercising her discretion whether to grant relief from deportation under the INA. See *Hassan* v. *INS*, 66 F.3d 266, 269 (10th Cir. 1995); *Delgado-Chavez* v. *INS*, 765 F.2d 868, 869 (9th Cir. 1985) (prior conviction that Section 1251(b) precluded from serving as basis for deportation nonetheless "may be considered as an adverse factor [by the Attorney General's delegates] in deciding whether the favorable exercise of discretion is warranted"); *Oviawe* v. *INS*, 853 F.2d 1428, 1431-1434 (7th Cir. 1988); *In re Gonzalez*, 16 I. & N. Dec. 134, 135 & n.1 (BIA 1977). But see *Giambanco* v. *INS*, 531 F.2d 141, 147-149 (3d Cir. 1976). Even more significantly, former Sections 155 and 1251(b) did not authorize a district court to initiate deportation proceedings against an alien and did not grant a district court jurisdiction to enter a deportation order against an alien as part of a criminal sentence.

3. The fact that Congress did not intend, through the single sentence in Section 3583(d), to carve out a category of cases in which judicial orders of deportation are authorized is evident when Section 3583(d) is compared to a later enacted provision, 8 U.S.C. 1252a(d) (renumbered by the IIRAIRA as Section 238(c) of the INA (to be codified at 8 U.S.C. 1228(c))), in which Congress explicitly authorized judicial orders of deportation in certain cases, according to certain procedures.

a. In 1994, Congress added subsection (d) to Section 242A of the INA to provide that a district court "shall have jurisdiction to enter a judicial order of deportation at the time of sentencing" against certain criminal aliens in particular cases. 8 U.S.C.

1252a(d)(1).[15] See Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 224(a), 108 Stat. 4322-4323.[16] Congress included that provision as part of the INA, not as part of the criminal code, and was explicit in establishing district court jurisdiction to enter deportation orders (*i.e.*, court "shall have jurisdiction to enter a judicial order of deportation"). Moreover, Congress created a mechanism that preserves the Attorney General's

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[15] Aliens to whom Section 1252a(d), as enacted in 1994, applies are those convicted of certain crimes of moral turpitude, those with multiple criminal convictions involving moral turpitude, and those convicted of an aggravated felony. See 8 U.S.C. 1251(a)(2)(A); *United States* v. *Quaye*, 57 F.3d at 450 n.2; *United States* v. *Phommachanh*, 91 F.3d at 1386. The IIRAIRA subsequently amended Section 242A(d) of the INA, 8 U.S.C. 1252a(d) (and renumbered it as Section 238(c) of the INA (to be codified at 8 U.S.C. 1228(c))), apparently intending to broaden its applicability to all criminal cases involving deportable aliens and to narrow the circumstances in which a court order would have preclusive effect in an administrative proceeding. See IIRAIRA § 374(a) (*reproduced at* 138 Cong. Rec. H11,813-H11,814 (daily ed. Sept. 28, 1996)).

[16] Before the amendment authorizing judicial deportation orders, Congress had addressed the issue of deportation of criminal aliens by enacting Section 1252a of Title 8 in 1988 to provide for expedited deportation proceedings at correctional facilities for aliens convicted of aggravated felonies to ensure "expeditious deportation, where warranted, following the end of the alien's incarceration for the underlying sentence." 8 U.S.C. 1252a(a)(1) (1988). See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7347, 102 Stat. 4471. Earlier in 1994, Congress had amended Section 1252a to create expedited administrative procedures for the deportation of aliens who are not lawfully admitted to the United States, have committed an aggravated felony, and are not eligible for relief from deportation. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130004, 108 Stat. 2026-2028.

authority to initiate deportation by conditioning the district court's jurisdiction to deport an alien in a particular case on a request "by the United States Attorney with the concurrence of the Commissioner [of the INS]" to enter a judicial deportation order in that case. 8 U.S.C. 1252a(d)(1).

Congress established detailed procedures to be followed by the United States Attorney, the INS Commissioner, and the court in making a request for judicial deportation and in deciding whether to enter such an order. The procedures incorporate the essential safeguards of INA administrative proceedings (see note 12, *supra*) and permit aliens to seek relief from deportation under the INA. The United States Attorney must provide notice, before trial or entry of a plea, to the court and the alien defendant of an intent to request judicial deportation. 8 U.S.C. 1252a(d)(2)(A). After conviction, but 30 days before sentencing, the United States Attorney, with the concurrence of the INS Commissioner, must file a charge "containing factual allegations regarding the alienage of the defendant and identifying the crime or crimes which make the defendant deportable under section 1251(a)(2)(A)." 8 U.S.C. 1252a(d)(2)(B). If the alien defendant establishes prima facie eligibility for relief from deportation under the INA, the INS Commissioner must provide the sentencing court with a recommendation and report on the alien's eligibility for relief, and the court is expressly authorized to then "either grant or deny the relief sought." 8 U.S.C. 1252a(d)(2)(C). The alien defendant is afforded the right to examine the evidence against him or her, to present evidence, and to cross-examine government witnesses. 8 U.S.C. 1252a(d)(2)(D)(i). The court's deportation order can be based on consid-

eration only of evidence that would be admissible in an administrative deportation hearing under the INA. 8 U.S.C. 1252a(d)(2)(D)(ii). Congress explicitly stated that a district court "may order the alien deported if the Attorney General demonstrates that the alien is deportable" under the INA. 8 U.S.C. 1252a(d)(2) (D)(iv).[17] Finally, Congress preserved the Attorney General's authority to initiate administrative deportation proceedings against the alien defendant under the INA, upon the same ground or other grounds of deportability, notwithstanding a district court's denial of a request for a judicial order of deportation under Section 1252a(d), so long as the district court did not issue a decision on the merits of the request. 8 U.S.C. 1252a(d)(4).

The explicit limitation of the district court's authority to cases in which the Attorney General's delegates seek judicial deportation, and the detailed procedures and standards set forth to govern judicial deportation orders, are wholly absent from Section 3583(d) of Title 18.[18] Thus, if Section 3583(d) is interpreted to allow a district court to order an alien

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[17] Under Section 1252a(d), an alien defendant and the United States have the right to appeal from a grant or a denial of judicial deportation and that appeal is governed, as a general matter, by the provision of the INA that governs judicial review of the Attorney General's final administrative orders of deportation. See 8 U.S.C. 1252a(d)(3)(A).

[18] We do not agree with petitioner or his *amici* (see, *e.g.*, Pet. Br. 24-27) that, if Section 3583(d) were interpreted to grant district courts authority to enter judicial orders of deportation, constitutional problems would arise. If district courts were granted such jurisdiction, we are confident that they would afford alien defendants the necessary procedural safeguards to meet constitutional due process standards.

defendant deported as a condition of supervised release, the result would be an "illogical set of judicial deportation rules." *United States* v. *Phommachanh*, 91 F.3d at 1387; *United States* v. *Quaye*, 57 F.3d at 450 (reading Section 3583(d) to authorize judicial deportation orders "would create an extraordinary set of rules"). Section 3583(d) would permit judicial deportation of any deportable aliens without the specific procedural safeguards Congress has provided in the INA, while 8 U.S.C. 1252a(d) would protect deportable aliens convicted of particularly heinous crimes with those detailed procedural safeguards. *United States* v. *Phommachanh*, 91 F.3d at 1387; *United States* v. *Quaye*, 57 F.3d at 450. In addition, such a reading of Section 3583(d) would "allow[] broader judicial deportation than that allowed by the subsequently enacted § 1252a(d)," thereby rendering Section 1252a(d) meaningless. *United States* v. *Phommachanh*, 91 F.3d at 1387; *United States* v. *Xiang*, 77 F.3d at 773.

Congress must be presumed not to have performed such "a useless act" in enacting Section 1252a(d). *United States* v. *Phommachanh*, 91 F.3d at 1387 (quoting 2B Norman J. Singer, *Sutherland Statutory Construction* § 49.11, at 83 (5th ed. 1992)). Like the Tenth Circuit, this Court should decline to "interpret § 3583(d) in such a way as to create this nonsensical combination of judicial deportation rules." *Ibid.*

b. Congress's amendment, in 1996, of the INA provisions regarding judicial deportation orders further demonstrates that Section 3583(d) should not be interpreted to authorize entry of a judicial deportation order as a condition of supervised release. Section 374(a)(3) of the IIRAIRA added a new subsection to Section 242A of the INA, 8 U.S.C. 1252a (renumbered by the IIRAIRA as Section 238 of the INA

(to be codified at 8 U.S.C. 1228)), that authorizes stipulated orders of deportation via plea agreements whereby the alien defendant agrees to a judicial order of deportation as a condition of a plea agreement or as a condition of probation or supervised release. See 138 Cong. Rec. H11,813-H11,814 (daily ed. Sept. 28, 1996) (to be codified at 8 U.S.C. 1228(c)(5)). Such stipulated orders of deportation are authorized, however, only in cases where the United States Attorney has obtained the concurrence of the Commissioner of the INS to enter into the plea agreement and the stipulation. *Ibid.* The IIRAIRA also explicitly grants a district court "jurisdiction to enter a judicial order of deportation pursuant to the terms of such stipulation." *Ibid.* Moreover, Section 374(b)(3) of the IIRAIRA amended the criminal code relating to probation to provide that a court may order an alien deported as a condition of probation either pursuant to such a stipulation under the INA or "if, after notice and hearing pursuant to [8 U.S.C. 1228(c)], the Attorney General demonstrates by clear and convincing evidence that the alien is deportable." See 138 Cong. Rec. H11,814 (daily ed. Sept. 28, 1996) (to be codified at 18 U.S.C. 3563(b)(21)).

The IIRAIRA did not, however, amend the criminal code relating to conditions of supervised release in a similar manner. Thus, Section 3583(d) still contains only a single sentence authorizing a district court to "provide" that an alien defendant be deported as a condition of supervised release, without any explicit grant of jurisdiction to the district court to enter a judicial order of deportation, without any provision for consultation with, or a request from, the United States Attorney or the Commissioner of the INS, and without any of the procedural safeguards contained in

the other provisions governing deportation determinations. Under those circumstances, it would be unreasonable to construe Section 3583(d) to effect a similar change regarding the authority of district courts in deportation matters vis-a-vis the authority of the Attorney General.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Section 3583 of Title 18 provides, in relevant part:

§ 3583. Inclusion of a term of supervised release after imprisonment

(a) IN GENERAL.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) AUTHORIZED TERMS OF SUPERVISED RELEASE.—Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

* * * * *

(d) CONDITIONS OF SUPERVISED RELEASE.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of

supervision and that the defendant not unlawfully possess a controlled substance. * * * The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

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